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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1156

MAYTE C. ROSS, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petitioner, Mayte C. Ross, by her attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled cause on January 23, 1942, affirming an unpublished decision of the United States Board of Tax Appeals.

OPINIONS BELOW.

The opinion of the Board of Tax Appeals (R. 1 to 5) is a memorandum opinion and is unpublished. The opinion of the Circuit Court of Appeals (R. 27-29) was promulgated on January 23, 1942 and is reported at 125 F. 2d 767.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on January 23, 1942 (R. 30). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

The petitioner contended before the United States Board of Tax Appeals that during the years 1935, 1936 and 1937 here involved, she carried on an active and continuous real estate business and that the Commissioner of Internal Revenue erred by disallowing as deductions from gross income the sums paid during these years by her to her general agent and to various realtors, appraisers, accountants and lawyers for services rendered in connection with the petitioner's business. The Board of Tax Appeals affirmed the determination of the Commissioner.

The petitioner urged before the Circuit Court of Appeals that the management of real estate and the buying and selling of real property constitutes the "carrying on of a trade or business" and that the Board of Tax Appeals erred by disregarding specific, competent and relevant testimony showing that the petitioner was engaged in the real estate business. The Circuit Court of Appeals found as a fact that C. Chandler Ross was a general agent for petitioner (R. 28) but affirmed the Board of Tax Appeals on the ground that the petitioner was not engaged in business and did not hold herself out to others as being so engaged (R.

29). Accordingly this petition presents the following questions:

1. Whether the Board of Tax Appeals and the Circuit Court of Appeals erred in disregarding certain specific evidence of the petitioner showing that she was engaged through her general agent in the management of real estate and the buying and selling of real property.

2. Whether the management of real estate and the buying and selling of real property is a business within the meaning of Section 23(a) of the Revenue Acts of 1934 and 1936.

STATUTES INVOLVED.

Revenue Act of 1934, c. 277, sec. 23 (a), 48 Stat. 688.

> "DEDUCTIONS FROM GROSS INCOME. In computing net income there shall be allowed as deductions:
>
> (a) Expenses.
>
> (1) In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered: traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, or property to which the taxpayer has not taken or is not taking title or in which he has no equity."

Section 23(a) of the Revenue Act of 1936 contains the same provisions.

STATEMENT.

The Circuit Court of Appeals found the following facts (R. 27-28):

> "The petitioner is the widow of Henry D. Dechant who died on February 9, 1931. The petitioner married her present husband, C. Chandler Ross on November 7, 1931. When Dechant died he left the petitioner $300,000 in insurance, a life interest in an estate worth approximately $3,000,000, and real estate located in Florida and New Hampshire. In March, 1932 letters were exchanged between the taxpayer and her husband whereby it was agreed that she should pay him $25,000 a year in consideration of his giving up his profession as a portrait painter and devoting all of his time to looking after her financial and business affairs. This agreement was to be in force for five years unless sooner terminated by mutual consent. The agreement was renewed and has continued in effect.
>
> "The petitioner sought to claim as a deduction for 1935, 1936 and 1937 the sum of each year's salary paid to her husband under the agreement referred to. She also claims as deductible items specified legal and accounting expenses incurred in connection with certain trusts. As to these it may be stated that the petitioner was dissatisfied with the activities of William H. Berg, trustee of both trusts and president of Health Products Company, a corporation organized by the petitioner's late husband and from which a large part of her income was derived. As a result of legal proceedings instituted by the petitioner with the aid of Ross and counsel Berg resigned as president and returned certain stock of the corporation theretofore voted to him. *Ross also looked after the taxpayer's real estate* and her investments. *He was in fact a sort of general agent* for her." (Italics supplied.)

Both the Court below and the Board of Tax Appeals disregarded the following facts shown by the unrebutted evidence of petitioner's witnesses:

During the years 1935, 1936 and 1937 the petitioner engaged in substantial and extensive real estate transactions in New York, New Jersey and Florida. (R. 14, 15, 16.)

Among her real estate transactions during the years 1935, 1936 and 1937, carried out by her general agent, Mr. Ross, were the following:

She obtained control of the real property situated on the west side of 178th Street, New York City, by buying out three other interested parties; foreclosed the mortgage on the property and took title (R. 15); she then secured a buyer for the property and sold it for $76,000 (R. 15).

Petitioner secured control of the real property known as 270 Convent Avenue, New York City, acting with the cooperation of the attorney for other parties interested in this property. She then withdrew the property from its rehabilitator (R. 16), entered into sale negotiations and finally sold the property for $155,000 (R. 16).

She secured control of ten parcels of real estate located in Eastern New Jersey, underlying a mortgage certificate having a face value of $75,000 in the Fidelity Union Title & Mortgage Company of New Jersey. After securing control of these properties, the petitioner sold two-thirds of the properties for cash and held the other third of the properties, receiving payments thereon (R. 16). These various transactions involved substantial work and negotiation and not less than $275,000 worth of real estate was acquired and sold by the petitioner (R. 14, 15, 16, 17).

During 1935, 1936 and 1937 petitioner also engaged in the activity of buying up mortgages on real properties at Miami Beach, Florida. By 1935 her general agent, Mr. Ross, had become registered with the Real Estate Board at Miami. He secured the services of a competent appraiser and they checked the ground value, current value, status of building permits, etc. of selected properties (R. 13, 18). The properties were then personally inspected by Ross and the appraiser and if found satisfactory the mortgages were purchased at a determined value (R. 13, 18). During the years 1935, 1936 and 1937, approximately $150,000 was expended by the petitioner in these selected mortgages (R. 17-18). Miami Beach, Florida, was chosen for the buying of the mortgages because it is the highest rated small city in

America for such investments (R. 18). Among the properties chosen at Miami Beach upon which mortgages were purchased by the petitioner upon selected real estate during 1935, 1936 and 1937 were the following: Hampton, Edward Fisher, Horning, E. L. Lockhart, Clark, Gerger, Sunset Island, Edward Holm, Cherry Lee Apartment Building and Hardiman (R. 18). In selecting the real property on each occasion Ross and the appraiser personally examined the properties thereunder, the abstract of title and determined the value (R. 18).

In connection with her real estate activities in New York, New Jersey and Florida, the petitioner, through her manager, Mr. Ross, employed accountants, realtors, lawyers and appraisers, paying them $9,700 in 1935 and $8,121 in 1936 for their services (R. 21-22).

In order to conduct the business of petitioner, Mr. Ross maintained an office at 1441 Broadway, New York City (R. 17). Mr. Ross also maintained an office in Miami, Florida, for the purpose of carrying on the petitioner's business there in real estate and investments (R. 9). The business was not that of Mr. Ross; it was the petitioner's business and her money was used in the business (R. 9).

It was stipulated between the parties at the hearing that the deduction of $25,000 (salary paid to Ross) here involved was allowed by the Commissioner of Internal Revenue in the previous years not at issue (R. 11).

Specification of Errors to be Urged.

The Court below erred:

1. In failing to reverse the decision of the Board of Tax Appeals on the ground that the Board had erred by disregarding competent, relevant and uncontradicted testimony, showing that the petitioner maintained business offices and was engaged in the business of buying, selling and managing real estate during the years involved.

2. In failing to find that during the years here involved the petitioner maintained business offices in New York City

and Miami, Florida; that she acquired control of and sold two substantial parcels of real property in New York City; that she purchased, sold and managed ten parcels of real estate in Eastern New Jersey; that during the period involved she bought and sold $275,000 worth of real estate in New York and New Jersey; that she engaged continuously in the appraising of real property and the buying of mortgages thereon at Miami Beach, Florida; and that these transactions constituted the carrying on of a real estate business within the meaning of Section 23(a) of the Revenue Acts of 1934 and 1936.

3. In failing to decide that the salary paid by petitioner to her general agent and the sums paid by her to accountants, realtors, lawyers and appraisers during the period involved constituted ordinary and necessary business expenses under Section 23(a) of the Revenue Acts of 1934 and 1936.

REASONS FOR GRANTING THE WRIT.

We believe that:

I.

The question here at issue involves important principles of Federal tax law. The case brings to this Court for the first time the question whether the management of one's own real property and the buying and selling of real estate constitutes the "carrying on of a business" within the meaning of Section 23(a) of the Revenue Acts. It also presents for decision the question of the extent of activity in the management of real property and the buying and selling thereof which is necessary to meet the test of "carrying on any trade or business" under Section 23(a) of the Revenue Acts.

In *Eugene Higgins* v. *Commissioner*, 312 U. S. 212, 61 S. Ct. 475, the Commissioner of Internal Revenue determined that insofar as Higgins was engaged in the management of his real estate, the taxpayer was carrying on a business

and the Board of Tax Appeals did not disturb this conclusion. That issue was not presented to the Circuit Court of Appeals or to this Court.

In a subsequent case, *Pinchot* v. *Commissioner* (C. C. A. 2), 113 F. (2d) 718, the Circuit Court of Appeals held that the management of real estate constituted a business, stating:

> "Our decision in Higgins v. Commissioner, 2 Cir. 111 F. (2d), did not touch the question of real estate management as a business."

In the case at bar the petitioner, during the years involved, acquired control of, managed and sold after long negotiation two substantial parcels of realty in New York City and the ten tracts of land located in Eastern New Jersey. In addition she engaged in the activity of buying mortgages on tracts of land and apartment houses at Miami Beach, Florida. (R. 14-18) She maintained an office at 1441 Broadway, New York City, from which the eastern transactions were carried on and another office at Miami Beach, Florida. (R. 17 and 9) Both the Board of Tax Appeals and the Circuit Court of Appeals failed to find these facts and disregarded them in their decisions.

In *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, this Court defined the term "business" as follows:

> "It remains to consider whether these corporations are engaged in business. 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158 citing People ex rel. Hoyt v. Tax Comrs., 23 N. Y. 242, 244. 'That which occupies the time, attention and labor of men for the purpose of a livelihood or profit,' 1 Bouvier's Law Dict. p. 272."

This definition was quoted with approval in *Von Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 515.

Recently the term "business" has been redefined by this Court to mean that for the purpose of Section 23(a) of the Revenue Acts there must be a "holding one's self out to

others as engaged in the selling of goods or services". *Deputy* v. *duPont*, 308 U. S. 488, 499.

To determine whether the activities of a taxpayer constitute the "carrying on of a business" requires an examination of the facts in each case. *Higgins* v. *Commissioner, supra; Deputy* v. *duPont, supra.* We think that the activities of Mrs. Ross in buying and selling real property and in maintaining offices from which the transactions were carried out meet the definitions of this Court by the term "business" in *Flint* v. *Stone Tracy Co., supra,* and *Deputy* v. *duPont, supra,* and that the Court below erred in disregarding these active business transactions. Here there was an offering of real estate for sale, an actual selling thereof and a holding out to others by means of offices and personal contacts that the real property was for sale (R. 14, 15, 16, 17). It is respectfully submitted that the question whether such real estate activities as those of this petitioner herein constitute a "business" is one which should now be settled by this Honorable Court. The question of security transactions was settled in *Higgins* v. *Commissioner, supra,* and *Deputy* v. *duPont, supra.*

II.

The Court below and the Board of Tax Appeals failed to find and disregarded uncontradicted evidence of petitioner's witnesses, showing that during the period involved she bought, sold, appraised and managed real property (R. 14, 15, 16, 17).

It was reversible error to so disregard the competent, relevant and uncontradicted evidence upon the vital issue in the case, viz., whether the petitioner actually bought, sold and managed real property. *Planters Operating Co.* v. *Commissioner*, 55 F. (2d) 583; *Belridge Oil Co.* v. *Commissioner* (C. C. A. 9), 85 F. (2d) 762; *Conrad & Co.* v. *Commissioner* (C. C. A. 1), 50 F. (2d) 576; *Bonwit Teller & Co.* v. *Commissioner* (C. C. A. 2), 53 F. (2d) 381; *Chicago Rwy. Equip. Co.* v. *Blair* (C. C. A. 7), 20 F. (2d) 10; *Dempster*

Mill Mfg. Co. v. *Burnet* (Ct. of App., D C), 46 F. (2d) 604.

The disregarding of petitioner's competent, relevant, positive and unrebutted testimony upon the pertinent issue in the case creates a conflict between the decision of the Court below and the decisions of other Circuit Courts of Appeal in the cases cited in the preceding paragraph.

III.

The decision of the Court below is in conflict with the decision of the United States Circuit Court of Appeals for the Second Circuit in *Pinchot* v. *Commissioner, supra* (113 F. (2d) 718, 719). In that case the Court relied upon the definition of business by this Court in *Flint* v. *Stone Tracy Co., supra,* and held that the active management of one's own real estate was "carrying on business" within the meaning of the Revenue Acts. The Court said:

> "Our decision in Higgins v. Commissioner, 2 Cir. 111 F. (2d) 796, did not touch the question of real estate management as a business.

IV.

The decision of the Court below is in conflict with the decision of the United States Circuit Court of Appeals for the Fourth Circuit in *Helvering* v. *Cecil B. Highland, Executor,* 124 F. (2d) 556.

In that case the taxpayer, as executor and testamentary trustee of a substantial estate, deducted legal expenses arising out of actions to retain control or management of the estate. The Court held that the expenses were properly deductible, pointing out that the estate by virtue of its holdings in several real estate companies, was actively engaged in the real estate business. The estate held capital stock in several land companies and a majority of the Class "A" common stock in a company which published three newspapers. Here the petitioner actually bought, sold and managed the realty in question through her general agent. In fact, the Court below found that Ross looked after the tax-

payer's real estate and investments and was "a sort of general agent for her" (R. 28).

In the *Highland* case the Court stated in part as follows:

> " • • • 'Business' as first defined by the Supreme Court was said to embrace 'everything about which a person could be employed' and 'which occupies the time, attention and labor of men for the purpose of a livelihood or profit'. See Flint v. Stone Tracy Co., 220 U. S. 107, 171, quoted with approval in Von Baumbach v. Sargent Land Co., 242 U. S. 503, 515. More recently the term has been re-defined by that Court and narrowed so that 'carrying on any trade or business' is now said to mean a 'holding one's self out to others as engaged in the selling of goods or services.' See Deputy v. duPont, 308 U. S. 488, 499, quoted with approval in Helvering v. Wilmington Trust Co., 414 C. C. H. 1941 Fed. Tax Serv. § 9666 (3rd Cir.); cf. Higgins v. Commissioner, 312 U. S. 212. This interpretation means substantially that the deduction of expenses can be had only as against the business in which the individual is engaged. No case of private investment management can as a matter of law, constitute a business. But see H. R. 6175 (Bill introduced Dec. 4, 1941 by Congressman Disney, proposing a change in the existing law on this matter).
>
> "Even under this new spun definition of 'business', however, certain factors remain of lasting evidentiary importance. *For instance, the profit motive and presence of business-like policies should be given great weight.* E. g., Cecil v. Commissioner, 4th Cir. 100 F. (2d) 896; Whitney v. Commissioner, 3rd Cir. 73 F. (2d) 589; Commissioner v. Field, 2nd Cir., 67 F. (2d) 876; Doggett v. Burnett, App. D. C. 65 F. (2d) 191; Plant v. Walsh, 280 Fed. 722; cf. Chaloner v. Helvering, App. D. C., 69 F. (2d) 571; Union Trust Co. v. Commissioner, 6th Cir., 54 F. (2d) 199; Deering v. Blair, App. D. C. 23 F. (2d) 975; Thacher v. Lowe, 288 Fed. 994; see Deputy v. duPont, 308 U. S. 488, 500. *Similarly, the fact that a separate office is maintained is of evidentiary importance to suggest that the taxpayer is engaged in business.* See Foss v. Commis-

sioner, 1st Cir., 75 F. (2d) 326, 328; cf. Washburn v. Commissioner, 8th Cir., 51 F. (2d) 949." (Italics supplied)

In the case at bar the Court below ignored the profit motive in the petitioner's transactions and disregarded the fact that she maintained business offices (R. 17 and 9). Also when the two cases are compared, it appears that this petitioner stands in a much more favorable light than the estate in the *Highland* case. Here she carried on the transactions individually through her agent, whereas the estate held stock in the land companies involved.

V.

The Treasury Department now holds that an owner of real property is entitled to depreciation and expense deductions even though the operation of such property is not the taxpayer's principal business and has applied this ruling to cases where the taxpayer owns only a single parcel of realty. Bulletin F revised as of January, 1942, and published by the Treasury Department in connection with rates of depreciation states the following on page 85:

* * * * * * * * *

"The owner of real property rented for residential purposes is entitled to deductions for depreciation of the property even though the operation of such property is not his principal trade or business."

* * * * * * * * *

In *John D. Fackler* v. *Commissioner*, 45 B. T. A. 708, now pending before the Sixth Circuit on the taxpayer's appeal, the taxpayer owned a single lease for 99 years on certain land and a building thereon. He sublet the building to various tenants and in 1938 sold the lease at a gain, returning the profit on his 1938 income tax return as capital gain. The Commissioner of Internal Revenue determined that the lease constituted property used in a trade or business of a character subject to depreciation and expense deductions

and held that the lease was not a capital asset upon which the capital gain rates could be used in reporting profit from the sale. The Board of Tax Appeals, on November 14, 1941, affirmed the Commissioner's determination and held that the lease was property "used in trade or business" even though the taxpayer was a lawyer and owned only this one leasehold which he rented.

As has been shown hereinabove the petitioner acquired and sold numerous substantial tracts of realty in New York and New Jersey (R. 14-17). She held portions of the New Jersey land upon which income was received and purchased income producing mortgages in Florida. The Court below found as a fact (R. 28) that Ross, petitioner's general agent, looked after the petitioner's real estate and that he rented certain residences for the taxpayer (R. 29).

We think that the position of the Treasury Department and the Board of Tax Appeals is clearly inconsistent when the facts in this case are considered in the light of Treasury's Bulletin F and *John D. Fackler* v. *Commissioner, supra.* If a taxpayer who owns and rents but a single piece of realty is entitled to deductions on the theory that he is engaged in a realty business or that the property is used "in a trade or business," then it appears that Mrs. Ross, who acquired, sold and held realty on a substantial scale, is engaged in business and entitled to her expense deductions.

For the reasons above set forth, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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